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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1286

VINCENT ANTHONY CIRAOLO,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: March 20, 1973

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The Petitioner, VINCENT ANTHONY CIRAOLO, prays that a Writ of Certiorari issue to review the judgment and opinion entered on January 9, 1973 by the United States Court of Appeals for the Fifth Circuit in the proceeding entitled United States of America, Plaintiff-Appellee against Otis Thurmond Curry and Vincent Anthony Ciraolo, Defendants-Appellants, docket number 72-1831.

Opinion Below

The judgment and opinion of the Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix at page A-1.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on January 9th, 1973. A Petition for re-hearing and re-hearing in banc was denied on January 29th, 1973.

By order of Mr. Justice Powell, the time in which to serve and file this Petition for a Writ of Certiorari has been enlarged to and including March 20, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether the Petitioner was denied due process and his Constitutional right to a jury trial by the inattentiveness of a particular juror?

Statutory Provisions Involved

TITLE 18, UNITED STATES CODE, SECTION 371, states in part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

TITLE 18, UNITED STATES CODE, SECTION 472, states as follows:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

TITLE 18, UNITED STATES CODE, SECTION 473, states as follows:

> "Whoever, buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

Statement of the Case

The Petitioner, Vincent Anthony Ciraolo, was indicted along with two other named defendants and charged with two substantive counts of violating the Federal Counterfeiting Laws, Title 18, United States Code, Sections 472, and 473, and conspiracy to violate those sections in violation of Title 18, United States Code, Section 371. On each of these counts the defendant was convicted before the District Court and a jury and sentenced to a total term of 16 years imprisonment.

Following the testimony of one Agent Insabella, a Federal Agent who testified on behalf of the Government, counsel for the Petitioner moved for the declaration of a mistrial on the ground that juror number 2 was asleep and noticeably inattentive during the testimony (SR 415).* This motion was denied (SR 416). Later a second motion for a mistrial was addressed to the fact that juror number 2 was sleeping for a substantial portion of the case and a request was made to the Court that it conduct an eviden-

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* SR refers to the supplemental record on appeal on file in the United States Court of Appeals for the Fifth Circuit.

tiary inquiry to determine whether there was a factual basis for Petitioner's motion (SR 465). Despite the fact that the District Court expressed that it was unaware whether or not the juror was sleeping this motion was similarly denied (SR 466).

After the Court's charge to the jury, a motion for the withdrawal of a juror and declaration of a mistrial was once more urged on the ground of the inattentiveness of juror number 2. This motion was made on counsel's representation that the juror in question had slipped into a state of unconsciousness while the Court was instructing the jury as to the applicable law (SR 676-678). In denying this third motion for a mistrial, the Court stated that

> "Well, among other things, I will make this observation, assuming that he was asleep during the presentation of the evidence he certainly was not asleep during the presentation of any of the defense's evidence. He was sleeping, if he was sleeping, during the time the Government was putting on its case and I couldn't imagine anything better if I were the defendant's lawyer than to have all 12 jurors sound asleep while the Government was presenting its witnesses."

The Court then stated that after the first motion for a mistrial, Judicial notice was taken that the juror remained awake until the conclusion of the trial. In addition, the District Court held that the initial motion for a mistrial, even assuming that the juror had been asleep, would be denied as untimely on the ground that counsel had a duty to advise the Court immediately upon noticing the apparent inattentiveness of the juror rather than remaining silent until the conclusion of the testimony.

Reasons for Granting the Writ

The Circuit Court of Appeals has ruled that Petitioner's motions for a mistrial were properly denied on the ground that defense counsel had the obligation to call to the attention of the trial court the juror's inattentiveness when first noticed. With regard to the trial court's denial of the two later motions the Appellate Court refused to overturn the lower court's factual observation that the juror in question remained awake during the completion of the trial. Petitioner herein respectfully submits to this Court that a review of this determination is fundamentally important to the pragmatic administration of the conduct of criminal trials on the level of the Federal District Court. Petitioner urges that the initial motion for the declaration of a mistrial may well have been timely, in that a hearing should have been held to explore all of the attendant factors necessarily contained in the issue raised by trial counsel. The problem of whether a juror is inattentive or merely receiving testimony with closed eyes can hardly be viewed as always readily apparent. It may well have been that counsel's determination was expressed to the trial court at the earliest moment that he had become certain of earlier suspicions. Only an evidentiary hearing could have resolved this issue.

It is well settled that one of the more important functions of the jury is to judge the credibility of each witness who testifies. Therefore, the trial court's observation that inattentiveness to the Government's case may benefit the defense is certainly unfounded.

In affirming the conviction below, the Court of Appeals cited *United States* v. *Carter*, 433 F. 2d 874 (10th Cir.,

1970) as authority for the proposition that counsel must immediately bring to the Court's attention any misconduct on the part of a juror. However, in *Carter* the defendant's allegation that a juror was asleep was raised in the form of a motion for a new trial. Further, the trial court in *Carter* was convinced that, in fact, the juror was not sleeping. Here, at least with respect to the initial motion for a mistrial, the question as to whether juror number 2 was sleeping, was left open and the juror's inattentiveness was brought to the District Court's attention upon the conclusion of the Government witness's testimony. This, it is submitted, in view of the facts herein, was timely in the context of the type of motion and the progress of the trial thus far.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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GERALD L. SHARGEL
Of Counsel

Dated: March 20, 1973

APPENDIX

Opinion and Judgment of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1831

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OTIS THURMOND CURRY and VINCENT ANTHONY CIRAOLO,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(January 9, 1973)

Before THORNBERRY, COLEMAN and INGRAHAM,

Circuit Judges.

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* Rule 18, 5th Cir.; *see Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 5th Cir. 1970, 431 F.2d 409, Part I.

Appendix
Opinion and Judgment of the Court of Appeals

THORNBERRY, Circuit Judge: Appellants Curry and Ciraolo were convicted below of possessing and concealing counterfeit currency in violation of 18 U.S.C.A. § 472, of exchanging and transferring counterfeit currency in violation of 18 U.S.C.A. § 473, and of conspiracy to commit both of these offenses in violation of 18 U.S.C.A. § 371. On appeal they urge three grounds for reversal. Finding each ground to be without merit, we affirm the convictions.

EXCLUDED TESTIMONY OF FRIGHTENED WITNESS

At the hearing on defendants' motion to suppress evidence, John Morton, an apparently innocent party who chanced to be on Curry's business premises when counterfeit currency was delivered, related in detail his recollection of the events that transpired there. Curry had a front office and a back office separated by a partition. Morton testified *inter alia* that except for a brief time when Curry entered the back office to close the door he, Curry, was always in the front office with Morton. Further, Morton testified he did not know whether Curry from his position in the front office could see into the back office where the counterfeit money was delivered. At the close of the suppression hearing testimony the trial judge denied the motion to suppress and declared the court in recess until the afternoon session.

During the recess Morton told Curry's counsel that a government agent had made a threatening remark to him before the suppression hearing and had made him afraid

to testify. As told by Morton, the remark was: "If you put your foot in this thing you'll get burned." Counsel for Curry brought this matter to the attention of the court at the beginning of the afternoon session, and Morton stated under oath that the government had intimidated him, as described above. In response to the judge's questions Morton affirmed that his earlier testimony had been the truth and was unaffected by the intimidation except for one particular: but for the intimidating remark Morton would have testified that Curry definitely could not have seen into the back office from his position in the front office rather than professing ignorance on this point. The government agent alleged to have intimidated Morton took the witness stand and categorically denied doing so. The trial judge denied motions to exclude the testimony of the government witnesses and to dismiss the prosecution.

The trial began. After the first day of trial, Morton told Curry's defense counsel that he was afraid to testify voluntarily; thereafter Curry's counsel was unable to locate him for service of a subpoena. Morton being unavailable to testify at trial, the trial judge permitted defense counsel to introduce Morton suppression hearing testimony into evidence, but refused to admit Morton's later statements regarding the intimidation and the change he would have made in his testimony on Curry's ability to see into the back office.

Appellant Curry's first argument on this appeal is that the trial judge erred in excluding Morton's later statements, or at least that portion of them which modified his original

version of the facts. Since Morton was unavailable to testify at trial and had been subject to cross-examination by all parties at the suppression hearing, his former testimony at the hearing was clearly admissible as an exception to the hearsay rule. *See* C. McCormick, *Evidence* §§ 254-62 (2d ed. 1972). Further, we must agree with appellant that Morton's later sworn testimony in which he modified his earlier statements should likewise have been admitted. This later testimony had a status under the hearsay rule identical to that of the suppression hearing testimony, and, if the earlier statements concerning Curry's ability to see into the back room were relevant, so were the later ones.

Although we conclude that the trial judge should have admitted this later statement, we cannot agree that his failure to do so constituted reversible error. First, the evidence of Curry's guilt was overwhelming. His accomplice Wilkerson testified at length and in detail concerning his agreement with Curry, under which Wilkerson delivered the counterfeit currency to Curry's place of business to be resold, and the two government agents who posed as prospective buyers strongly corroborated this testimony. The counterfeit bills themselves seized in Curry's back office provided further strong corroborating evidence. Secondly, we do not perceive any significant exonerating effect which Morton's amendment to his original testimony might have had. Since Morton originally placed Curry in the back office for a short time, purportedly to close the back door, his testimony does not conflict with the assertions of the accomplice and the government agents that Morton viewed the unpackaging of the counterfeit bills in the back office.

More generally, viewing the total picture presented by the evidence, we can discover no exculpatory impact in this putative discrepancy as to a detail. Hence, we conclude the exclusion of the later Morton testimony was harmless error. *See* Fed. R. Crim. P., Rule 52(a).

SLEEPING JUROR

At the conclusion of the testimony of agent Insabella, a government witness, defense counsel moved for a mistrial, asserting that juror number two had been sleeping "during the time that witness was testifying." The motion was denied. On the next day of the trial defense counsel renewed the motion, and it was again denied. After the reading of the charge to the jury, defense counsel again moved for a mistrial, alleging that juror number two had taken a second nap during three-fourths of the time the judge read the jury instructions. As to the first alleged nap, the trial judge stated he had not observed the juror during agent Insabella's testimony and did not know whether he had been asleep. The basis for the denial of the mistrial motions relating to this nap was that they came too late; counsel should have informed the court of the juror's inattentiveness when he first noticed it, not at the conclusion of the witness' testimony. The motion based on the second alleged nap was denied on the basis of the court's judicial knowledge, stated for the record, that juror number two had not been asleep since the first mistrial motions. Appellants argue the mistrial motions should have been granted.

We find the trial judge's bases for denying the sleeping-juror mistrial motions were entirely sufficient. Defense counsel had a duty to call a juror's inattentiveness to the court's attention when first noticed. *United States* v. *Carter*, 10th Cir. 1970, 433 F.2d 874, 876. Counsel may not permit juror misconduct or inattentiveness to go unnoticed, thereby sewing a defect into the trial, and later claim its benefit. Also, "[t]he conduct of the juror in open court was a matter of which the trial court had judicial knowledge and could take judicial notice." *Id.* We have no basis for overturning the trial judge's finding that juror number two did not sleep after the first mistrial motion.

ACCOMPLICE-TESTIMONY INSTRUCTION

Finally, appellant Curry argues that the jury instruction regarding the use of an accomplice's testimony was erroneous. Specifically, appellant complains that that part of the charge in which the judge stated the government has a right to use, and sometimes must use, accomplice testimony to prove its case constituted a disproportionately large part of the accomplice-testimony instruction and had the effect of overemphasizing the importance of the accomplice testimony in the minds of the jury.

Although an accomplice's uncorroborated testimony is sufficient to support a conviction in a federal court, *Wooten* v. *United States*, 5th Cir. 1967, 380 F.2d 230, cert. denied 389 U.S. 942, 88 S.Ct. 302, 11 L.Ed.2d 294, an accomplice's testimony is to be received with care and suspicion, and a

cautionary instruction to this effect to the jury is desirable. *See* 2 C. Wright, Federal Practice and Procedure § 490 (1969). Appellant concedes, as he must, that the trial judge properly gave such a cautionary instruction. Further, it is not error to inform the jury that the government may, and sometimes must, rely on an accomplice's testimony to prove its case. *United States* v. *Bartlett*, 8th Cir. 1971, 449 F.2d 700; *United States* v. *Corallo*, 2d Cir. 1969, 413 F.2d 1306, 1322. Having reviewed and considered the jury charge as a whole, we find no disproportionate emphasis on the government's right to use an accomplice's testimony.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1286

VINCENT ANTHONY CIRAOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a juror fell asleep during his trial and that his conviction therefore should be reversed.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of possessing and concealing counterfeit currency in violation of 18 U.S.C. 472, of exchanging and transferring counterfeit currency in violation of 18 U.S.C. 473, and of conspiracy to commit both of these offenses in violation of 18 U.S.C. 371. He was sentenced to a term of imprisonment for sixteen years. The court of appeals affirmed (Pet. App. A-1).

Petitioner's contention that he was denied due process and his constitutional right to a jury trial by the inattentiveness of one juror was raised below and properly rejected by the court of appeals (Pet. App. A-5--A-6) on

the ground that "Counsel may not permit juror misconduct or inattentiveness to go unnoticed, thereby sewing a defect into the trial, and later claim its benefit."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.